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3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON

5 JOHN JOSEPH RYAN,  
6 Plaintiff,  
7 vs.  
8 CAROLYN W. COLVIN, Acting  
9 Commissioner of Social Security,  
10 Defendant.

No. 1:14-cv-3006-FVS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

11 BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 15, 18.)  
12 Attorney D. James Tree represents plaintiff; Special Assistant United States Attorney Catherine  
13 Escobar represents defendant. After reviewing the administrative record and briefs filed by the  
14 parties, the court GRANTS plaintiff's Motion for Summary Judgment and DENIES defendant's  
15 Motion for Summary Judgment.

16 **JURISDICTION**

17 Plaintiff John Joseph Ryan (plaintiff) protectively filed for supplemental security income  
18 (SSI) on September 21, 2010. (Tr. 152, 174.) Plaintiff alleged an onset date of August 24, 2010.  
19 (Tr. 152.) Benefits were denied initially and on reconsideration. (Tr. 92, 104.) Plaintiff requested  
20 a hearing before an administrative law judge (ALJ), which was held before ALJ Gene Duncan on  
21 September 5, 2012. (Tr. 35-86.) Plaintiff was represented by counsel and testified at the hearing.  
22 (Tr. 36-42, 54-75.) Vocational expert Trevor G. Duncan and medical expert Dr. Donna Mary  
23 Veraldi also testified. (Tr. 43-53.) The ALJ denied benefits (Tr. 16-22) and the Appeals Council  
24 denied review. (Tr. 1.) The matter is now before this court pursuant to 42 U.S.C. § 405(g).

25 **STATEMENT OF FACTS**

26 The facts of the case are set forth in the administrative hearing transcripts, the ALJ's  
27 decision, and the briefs of plaintiff and the Commissioner, and will therefore only be  
summarized here.

Plaintiff was born May 9, 1978 and was 34 years old at the time of the hearing. (Tr. 152.)  
He has a GED. (Tr. 37.) He had been clean and sober for two years at the time of the hearing.

1 (Tr. 37, 42.) He last worked in 2003 as a janitor. (Tr. 38.) He was terminated from that job for  
2 using a client computer without permission. (Tr. 38.) He looked for other jobs but he did not  
3 have a GED at the time and no one would hire him. (Tr. 38.) He has other work experience as a  
4 call taker, dishwasher, and lawn service provider. (Tr. 41.) He has good days and bad days. (Tr.  
5 38.) On a good day, he can concentrate “at about a 50 percent level.” (Tr. 38.) On bad days, his  
6 depression is worse and he does not want to get out of bed. (Tr. 39.) He has bad days about two  
7 of every three days. (Tr. 71.) He wants to be left alone to vegetate until he can pull himself out of  
8 it. (Tr. 38-39.) He feels worthless and does not want to do anything. (Tr. 39.) He has manic  
9 episodes when he will scream, yell, throw things, and stomp around. (Tr. 39.) Manic episodes  
10 can last two to three hours. (Tr. 39.) He takes no medication. (Tr. 40, 71.) He has been through  
11 chemical dependency treatment where he learned how to overcome his problems. (Tr. 40-41.) He  
12 stopped mental health counseling because his counselor thought he was doing well and  
13 discharged him. (Tr. 40.) He testified his family hounds him which caused his depression to  
14 return worse than ever. (Tr. 41.)

#### 13 STANDARD OF REVIEW

14 Congress has provided a limited scope of judicial review of a Commissioner’s decision.  
15 42 U.S.C. § 405(g). A Court must uphold the Commissioner’s decision, made through an ALJ,  
16 when the determination is not based on legal error and is supported by substantial evidence. *See*  
17 *Jones v. Heckler*, 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9th  
18 Cir. 1999). “The [Commissioner’s] determination that a claimant is not disabled will be upheld if  
19 the findings of fact are supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570,  
20 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere  
21 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than a  
22 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v.*  
23 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial  
24 evidence “means such relevant evidence as a reasonable mind might accept as adequate to  
25 support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted).  
26 “[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the  
27 evidence” will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On  
review, the Court considers the record as a whole, not just the evidence supporting the decision

1 of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*  
2 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

3 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.  
4 Richardson, 402 U.S. at 400. If evidence supports more than one rational interpretation, the  
5 Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
6 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by  
7 substantial evidence will still be set aside if the proper legal standards were not applied in  
8 weighing the evidence and making the decision. *Brawner v. Sec’y of Health and Human Serv.*,  
9 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial evidence to support the  
10 administrative findings, or if there is conflicting evidence that will support a finding of either  
11 disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812  
12 F.2d 1226, 1229-30 (9th Cir. 1987).

### 13 SEQUENTIAL PROCESS

14 The Social Security Act (the “Act”) defines “disability” as the “inability to engage in any  
15 substantial gainful activity by reason of any medically determinable physical or mental  
16 impairment which can be expected to result in death or which has lasted or can be expected to  
17 last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c  
18 (a)(3)(A). The Act also provides that a plaintiff shall be determined to be under a disability only  
19 if his impairments are of such severity that plaintiff is not only unable to do his previous work  
20 but cannot, considering plaintiff’s age, education and work experiences, engage in any other  
21 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
22 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational  
23 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

24 The Commissioner has established a five-step sequential evaluation process for  
25 determining whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one  
26 determines if he or she is engaged in substantial gainful activities. If the claimant is engaged in  
27 substantial gainful activities, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I),  
416.920(a)(4)(I).

If the claimant is not engaged in substantial gainful activities, the decision maker  
proceeds to step two and determines whether the claimant has a medically severe impairment or

1 combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant  
2 does not have a severe impairment or combination of impairments, the disability claim is denied.

3 If the impairment is severe, the evaluation proceeds to the third step, which compares the  
4 claimant's impairment with a number of listed impairments acknowledged by the Commissioner  
5 to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
6 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the  
7 listed impairments, the claimant is conclusively presumed to be disabled.

8 If the impairment is not one conclusively presumed to be disabling, the evaluation  
9 proceeds to the fourth step, which determines whether the impairment prevents the claimant from  
10 performing work he or she has performed in the past. If plaintiff is able to perform his or her  
11 previous work, the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
12 At this step, the claimant's residual functional capacity ("RFC") assessment is considered.

13 If the claimant cannot perform this work, the fifth and final step in the process determines  
14 whether the claimant is able to perform other work in the national economy in view of his or her  
15 residual functional capacity and age, education and past work experience. 20 C.F.R. §§  
16 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

17 The initial burden of proof rests upon the claimant to establish a prima facie case of  
18 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel*  
19 *v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once the claimant  
20 establishes that a physical or mental impairment prevents him from engaging in his or her  
21 previous occupation. The burden then shifts, at step five, to the Commissioner to show that (1)  
22 the claimant can perform other substantial gainful activity and (2) a "significant number of jobs  
23 exist in the national economy" which the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,  
24 1497 (9th Cir. 1984). If the Commissioner does not meet that burden, the claimant is found to be  
25 disabled. *Burch v. Barnhart*, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005).

### 26 **ALJ'S FINDINGS**

27 At step one of the sequential evaluation process, the ALJ found plaintiff has never  
engaged in substantial gainful activity. (Tr. 18.) At step two, the ALJ found there are no medical  
signs or laboratory findings to substantiate the existence of a medically determinable  
impairment. (Tr. 18.) Thus, the ALJ concluded plaintiff has not been under a disability as

1 defined in the Social Security Act since September 21, 2010, the date the application was filed.  
2 (Tr. 21.)

### 3 ISSUES

4 The question is whether the ALJ's decision is supported by substantial evidence and free  
5 of legal error. Specifically, plaintiff asserts the ALJ erred by: (1) determining plaintiff does not  
6 have a medically determinable impairment; (2) improperly rejecting diagnoses and medical  
7 findings; (3) relying on the opinion of the medical expert; and (4) rejecting plaintiff's testimony  
8 regarding his limitations. (ECF No. 15 at 7-24.) Defendant argues: (1) the ALJ properly found  
9 plaintiff does not suffer from a severe medically determinable impairment; (2) the medical  
10 evidence does not support a finding of a severe impairment; (3) plaintiff's symptoms testimony  
11 is insufficient to establish a medically determinable impairment; and (4) the ALJ provided a  
12 sufficient basis for discounting plaintiff's testimony. (ECF No. 18 at 4-18.)

### 13 DISCUSSION

#### 14 1. Step Two

15 At step two of the sequential process, the ALJ must determine whether Plaintiff suffers  
16 from a "severe" impairment, i.e., one that significantly limits his or her physical or mental ability  
17 to do basic work activities. 20 C.F.R. § 416.920(c). To show a severe impairment, the claimant  
18 must first prove the existence of a physical or mental impairment by providing medical evidence  
19 consisting of signs, symptoms, and laboratory findings; the claimant's own statement of  
20 symptoms alone will not suffice. 20 C.F.R. §§ 404.1508, 416.908. A medically determinable  
21 impairment is an impairment that results from anatomical, physiological, or psychological  
22 abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic  
23 techniques. 42 U.S.C. § 423(d). In this case, the ALJ found plaintiff did not establish a medically  
24 determinable impairment under the regulations. (Tr. 18.)

25 Plaintiff argues the record includes "signs, symptoms, and laboratory findings" sufficient  
26 to establish a medically determinable impairment. (ECF No. 15 at 9-18.) "Signs, symptoms and  
27 laboratory findings" are defined as:

(a) Symptoms are your own description of your physical or mental impairment. If you are a child under age 18 and are unable to adequately describe your symptom(s), we will accept as a statement of this symptom(s) the description given by the person who is most familiar with you, such as a parent, other relative, or guardian. Your statements (or those of another person) alone,

1 however, are not enough to establish that there is a physical or mental  
2 impairment.

3 (b) Signs are anatomical, physiological, or psychological abnormalities which can  
4 be observed, apart from your statements (symptoms). Signs must be shown by  
5 medically acceptable clinical diagnostic techniques. Psychiatric signs are  
6 medically demonstrable phenomena that indicate specific psychological  
7 abnormalities, e.g., abnormalities of behavior, mood, thought, memory,  
8 orientation, development, or perception. They must also be shown by observable  
9 facts that can be medically described and evaluated.

10 (c) Laboratory findings are anatomical, physiological, or psychological  
11 phenomena which can be shown by the use of a medically acceptable laboratory  
12 diagnostic techniques. Some of these diagnostic techniques include chemical  
13 tests, electrophysiological studies (electrocardiogram, electroencephalogram,  
14 etc.), roentgenological studies (X-rays), and psychological tests.

15 20 CFR 416.928, 404.1528. Pursuant to S.S.R. 96-4p, “under no circumstances may the  
16 existence of an impairment be established on the basis of symptoms alone.” Additionally,  
17 “regardless of how many symptoms an individual alleges, or how genuine the individual’s  
18 complaints may appear to be, the existence of a medically determinable physical or mental  
19 impairment cannot be established in the absence of objective medical abnormalities, i.e., medical  
20 signs and laboratory findings.” *Id.* Thus, objective evidence must be present to establish a  
21 medically determinable impairment.

22 Plaintiff also argues the ALJ erred by failing to make a credibility finding. (ECF No. 15  
23 at 19-21.) Because the ALJ found there is no medically determinable impairment based on the  
24 objective evidence, and because a claimant’s symptoms alone, no matter how many or genuine  
25 they appear to be, cannot establish a medically determinable impairment, there was no need for  
26 the ALJ to make a credibility finding.<sup>1</sup> Therefore, the ALJ did not err by failing to make a  
27 specific credibility determination.

28 Thus, the primary issue is whether the ALJ properly considered the objective medical  
29 evidence. Plaintiff argues evidence from treating physician Dr. Sabry, Dick Moen, MSW,

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30 <sup>1</sup> If a medically determinable impairment is established at step two, plaintiff’s allegations about  
31 the intensity and persistence of the symptoms must be considered with the objective medical  
32 evidence in evaluating the functionally limiting effects of the impairment; i.e., in determining  
33 whether the impairment is a “severe” impairment under the regulations. S.S.R. 96-4p.

1 Russell Anderson, LICSW, and reviewing psychologists Dr. Beaty and Dr. Kester constitutes  
2 substantial evidence supporting a medically determinable impairment. Plaintiff also argues the  
3 ALJ erred by relying on the testimony of Dr. Veraldi, the medical expert.

4 **2. Dr. Sabry and Dr. Veraldi**

5 Plaintiff argues the ALJ rejected Dr. Sabry's findings without adequate explanation.  
6 (ECF No. 15 at 10-11.) The record reflects Dr. Sabry saw plaintiff in March, May, and  
7 September 2011. (Tr. 363, 369, 372.) On his first visit, plaintiff reported symptoms of depression  
8 in the context of the death of a friend or loved one which are aggravated by conflict or stress at  
9 home or work, lack of sleep and traumatic memories. (Tr. 372.) Symptoms include: depressed  
10 mood, diminished interest or pleasure, fatigue or loss of energy, feelings of guilt or  
11 worthlessness, poor concentration, indecisiveness and restlessness or sluggishness. (Tr. 372.) Dr.  
12 Sabry opined plaintiff has symptoms of a major depressive episode. (Tr. 372.) A patient health  
13 questionnaire (PHQ-9) completed by plaintiff reflected a score consistent with moderately severe  
14 depression. (Tr. 373.) Dr. Sabry observed a blunted affect and noted plaintiff is not anxious. (Tr.  
15 374.) Plaintiff's partner reported mood change. (Tr. 374.) Dr. Sabry diagnosed depressive  
16 disorder, NOS, and noted plaintiff had previously done well on Prozac and restarted the  
17 medication. (Tr. 374.)

18 At his second visit with Dr. Sabry in May 2011, plaintiff endorsed symptoms including  
19 anxious, fearful thoughts, depressed mood, diminished interest or pleasure, fatigue or loss of  
20 energy, panic attacks and sleep disturbance. (Tr. 369.) A PHQ-9 was again administered, but the  
21 results were not noted. (Tr. 369.) Dr. Sabry noted plaintiff was doing very well, starting to enjoy  
22 life, sleep better, and had one anxiety attack. (Tr. 370.) Dr. Sabry indicated a diagnosis of  
23 depressive disorder NOS and stated plaintiff should continue medication. (Tr. 371.)

24 At this third visit with Dr. Sabry in September 2011, plaintiff reported it is somewhat  
25 difficult to meet home, work or social obligations. (Tr. 363.) PHQ-9 results were consistent with  
26 moderately severe depression. (Tr. 364.) Dr. Sabry again noted the context was the death of a  
27 friend or loved one and symptoms are aggravated by conflict or stress at home or work and  
traumatic memories. (Tr. 363.) Symptoms reported by plaintiff included anxious, fearful  
thoughts, depressed mood, diminished interest or pleasure, fatigue or loss of energy, feelings of  
guilt or worthlessness, panic attacks, restlessness and sluggishness, significant change in  
appetitive, and sleep disturbance. (Tr. 363.) Dr. Sabry found plaintiff has the symptoms of a



1 major depressive episode and diagnosed depressive disorder NOS. (Tr. 363, 365.) Dr. Sabry  
2 noted plaintiff was doing well on the current dose of medication, however he “get[s] down every  
3 now and then.” (Tr. 364.) Dr. Sabry noted plaintiff was “improved” but increased the dose of  
4 medicine. (Tr. 365.)

5 Plaintiff argues the ALJ erred by failing to properly reject Dr. Sabry’s findings. (ECF No.  
6 15 at 10-11.) If a treating or examining physician’s opinions are not contradicted, they can be  
7 rejected only with clear and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir.  
8 1996). However, if contradicted, the ALJ may reject the opinion if he states specific, legitimate  
9 reasons that are supported by substantial evidence. *See Flaten v. Secretary of Health and Human*  
10 *Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup>  
11 Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9<sup>th</sup> Cir. 1989). The ALJ must do more than offer  
12 his conclusions. He must set forth his own interpretations and explain why they, rather than the  
13 doctors’, are correct. *Orn v. Astrue*, 495 F.3d 625, 632 (9<sup>th</sup> Cir. 2007).

14 Plaintiff argues the ALJ “offers no explanation for rejecting Dr. Sabry’s diagnosis other  
15 than noting that Mr. Ryan was doing well on medication in May 2011.” (ECF No. 15 at 10.) The  
16 ALJ pointed out that Dr. Sabry noted the claimant endorsed an array of depressive  
17 symptomology but also repeatedly indicated that his complaints were aggravated by stress and  
18 conflict in the home. (Tr. 19.) The ALJ cited a March 2011 note by Dr. Sabry stating plaintiff  
19 had previously done well on Prozac and it should be restarted. (Tr. 19.) The ALJ also noted Dr.  
20 Sabry reported in May 2011 that plaintiff was doing well. (Tr. 20.) The ALJ observed this was  
21 consistent with a discharge summary from a chemical dependency treatment provider in August  
22 2011 which indicated that plaintiff was taking antidepressants and reported being stable. (Tr. 20,  
23 381.) This is a reasonable assessment of the evidence. However, this does not amount to a  
24 rejection of Dr. Sabry’s diagnosis of depression and is insufficient to explain why Dr. Sabry’s  
25 diagnosis of depression does not constitute a medically determinable impairment. Defendant  
26 does not argue that the ALJ in fact rejected Dr. Sabry’s diagnosis.<sup>2</sup> Therefore, the court  
27 concludes the ALJ did not reject Dr. Sabry’s opinion.

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<sup>2</sup>To the extent defendant argues Dr. Sabry’s evidence is not supported by actual psychological  
“signs” as a reason for discounting the opinion (ECF No. 18 at 8), the court is constrained to  
review only those reasons asserted by the ALJ, even if that may be a legitimate reason for



1 Thus, the issue is whether Dr. Sabry's diagnosis of "depressive disorder" constitutes  
2 objective evidence of a medically determinable impairment. Plaintiff cites *Day v. Weinberger*,  
3 522 F.2d 1154, 1156 (9<sup>th</sup> Cir. 1975.), for the proposition that "when a claimant has been  
4 diagnosed with a condition by a medically acceptable source it constitutes objective medical  
5 evidence of impairment." (ECF No. 15 at 8.) However, the issue in *Day* was the ALJ's failure to  
6 set forth specific reasons for rejecting uncontroverted opinions of two physicians who opined  
7 plaintiff was disabled, despite being unable to pinpoint a diagnosis. 522 F.2d at 1156. The ALJ in  
8 that case cited the failure to make a diagnosis as a reason for rejecting the physician opinions, but  
9 the court concluded that reason provided little support for the ultimate nondisability finding  
10 because there was other significant evidence supporting the claim. *Id.* The *Day* court did not  
11 discuss step two or determine whether a diagnosis constitutes objective evidence of a medically  
12 determinable impairment.<sup>3</sup> *Id.* at 1154. As a result, *Day* is not persuasive in this case.

13 Defendant counters by citing *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9<sup>th</sup> Cir. 2004),  
14 for the rule that a diagnosis from a physician which is entirely reliant on a claimant's self-  
15 reported symptoms is not enough to establish a medically determinable impairment. (ECF No. 18  
16 at 8.) *Ukolov* is more on point because it addresses the findings necessary to support a medically  
17 determinable impairment. In that case, plaintiff had a number of complaints and had undergone  
18 an exhaustive neurological workup, but the physician had not been able to establish a definite  
19 neurological diagnosis. 420 F.3d at 1004. The court concluded that the physician's statement  
20 which mentioned gait and imbalance difficulties was insufficient to establish any medically  
21 rejecting the opinion. *Sec. Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Pinto v.*  
22 *Massanari*, 249 F.3d 840, 847-48 (9<sup>th</sup> Cir. 2001).

23 <sup>3</sup>The *Day* court cited 42 U.S.C. § 423(d) which provides that a medically determinable  
24 impairment is an impairment that results from anatomical, physiological, or psychological  
25 abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic  
26 techniques. *Id.*  
27

1 determinable impairment. The court also found that the doctor's records contained no references  
2 to results from medically acceptable clinical diagnostic techniques that would support a finding  
3 of impairment. Further, the court determined that the doctor's description of plaintiff's symptoms  
4 "do not support a finding of impairment because they are based solely on Ukolov's own  
5 'perception or description' of his problems." *Id.*

6 However, the *Ukolov* court did not hold, as defendant argues, that "it is not enough to  
7 present a 'diagnosis' from a physician entirely reliant on Plaintiff's self-reported symptoms."  
8 (ECF No. 18 at 8.) The facts in *Ukolov* differ from the current case because the treating doctor in  
9 *Ukolov* made no diagnosis. *Id.* The *Ukolov* court stated, "Because none of the medical opinions  
10 included a finding of impairment, a diagnosis, or objective test results, Ukolov failed to meet his  
11 burden of establishing disability." *Id.* This suggests that if a medical opinion had included a  
12 diagnosis, the outcome in *Ukolov* may have been different. Similarly, in *Webb v. Barnhart*, the  
13 court noted, "There is not, in this instance, the total absence of objective evidence of severe  
14 medical impairment such as was the case in *Ukolov* . . . where we affirmed a finding of no  
15 disability at step two when even the claimant's doctor was hesitant to conclude that any of the  
16 claimant's symptoms and complaints were medically legitimate." 433 F.3d 683, 688 (9<sup>th</sup> Cir.  
17 2005), *citing* 420 F.3d at 1006. In the case at hand, Dr. Sabry apparently concluded plaintiff's  
18 symptoms and complaints were medically legitimate and not only diagnosed but treated plaintiff  
19 with medication for depression. Although the basis for Dr. Sabry's conclusions may be  
20 somewhat unclear, the ALJ did not cite this or any other reason for rejecting Dr. Sabry's  
21 diagnosis. As a result, Dr. Sabry's diagnosis indicates there is a medically determinable  
22 impairment.

23 Even the testimony of Dr. Veraldi, the psychological expert, is equivocal on this issue.  
24 Dr. Veraldi testified that she does not believe the evidence justifies a medically determinable  
25 impairment. (Tr. 45.) However, she also testified that "perhaps some other people thought so, but  
26 I don't think so." (Tr. 45.) Dr. Veraldi testified that the basis for Dr. Sabry's diagnosis is "very  
27 slim" based on the record. (Tr. 46.) She went to state, "I don't know how you can do differential  
diagnosis off of these sort of just vague, you know, lists of a lot of symptoms. That doesn't say a  
lot to me. It may say a lot to other people." (Tr. 49.) However, when asked "Is it reasonable to  
assume that this doctor has a basis of his own at least to make that [diagnosis]?" Dr. Veraldi  
responded, "Yes, and sometimes I'm puzzled by them, but, yeah, he talks about depression

1 disorder NOS, which actually I would agree there's probably some type of depression . . . of  
2 some type." (Tr. 50.)

3 Defendant argues the ALJ properly relied on Dr. Veraldi's testimony because Dr. Sabry's  
4 opinion is inadequate. (ECF No. 18 at 9-10.) Plaintiff argues the ALJ erred by relying on Dr.  
5 Veraldi's testimony. (ECF No. 15 at 16-18.) The opinion of a nonexamining physician may serve  
6 as substantial evidence if it is supported by other evidence in the record and are consistent with  
7 it. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995). Other cases have upheld the rejection  
8 of an examining or treating physician based in part on the testimony of a non-examining medical  
9 advisor when other reasons to reject the opinions of examining and treating physicians exist  
10 independent of the non-examining doctor's opinion. *Lester*, 81 F.3d at 831, citing *Magallanes v.*  
11 *Bowen*, 881 F.2d 747, 751-55 (9<sup>th</sup> Cir. 1989) (reliance on laboratory test results, contrary reports  
12 from examining physicians and testimony from claimant that conflicted with treating physician's  
13 opinion); *Roberts v. Shalala*, 66 F.3d 179 (9<sup>th</sup> Cir. 1995) (rejection of examining psychologist's  
14 functional assessment which conflicted with his own written report and test results). Thus, case  
15 law requires not only an opinion from the consulting physician but also substantial evidence  
16 (more than a mere scintilla but less than a preponderance), independent of that opinion which  
17 supports the rejection of contrary conclusions by examining or treating physicians. *Andrews*, 53  
18 F.3d at 1039. The only other evidence from acceptable medical sources other than Dr. Sabry are  
19 the opinions of state reviewing psychologists Dr. Kester and Dr. Beaty, who found medically  
20 determinable impairments are supported by the record.<sup>4</sup> (Tr. 264-76, 282.) Thus, it does not  
21 appear other substantial evidence supports the finding of the nonexamining medical expert and  
22 the ALJ should not have relied primarily on Dr. Veraldi's opinion in finding no medically  
23 determinable impairment.

24 Furthermore, even if the ALJ reasonably relied on Dr. Veraldi's opinion, her testimony is  
25 not particularly helpful since she first challenges Dr. Sabry's diagnosis, then acknowledges that  
26 he has a basis to make the diagnosis. Step two is a "de minimis screening device [used] to  
27 dispose of groundless claims," and an ALJ may find that a claimant lacks a medically severe  
impairment or combination of impairments only when his conclusion is "clearly established by

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<sup>4</sup> The ALJ did not reject the opinions of Dr. Kester and Dr. Beaty but acknowledged they assessed work-related limitations. (Tr. 21, 260-62, 282.)

1 medical evidence.” *Webb*, 433 F. 3d a 687, citing *Smolen v. Chater*, 80 F.3d 1273, 1290 (9<sup>th</sup> Cir.  
2 1996); S.S.R. 85-28. Dr. Veraldi’s equivocal testimony does not “clearly establish” there is no  
3 medically determinable impairment. Thus, the evidence supporting the finding of no medically  
4 determinable impairment is not “clearly established” and falls short of the substantial evidence  
5 standard. As a result, the ALJ erred in relying on Dr. Veraldi’s opinion as the basis for the no  
6 medically determinable impairment finding.<sup>5</sup>

### 7 8 **3. Other Opinion Evidence**

9 Plaintiff argues the ALJ erred by failing to properly consider the opinions of Russell  
10 Anderson, LICSW, and Dick Moen, MSW. (ECF No. 12-15.) Mr. Moen and Mr. Anderson  
11 completed DSHS Psychological/Psychiatric Evaluation forms in October 2010 and October  
12 2011, respectively. (Tr. 228-34, 355-59.) Mr. Moen diagnosed major depression, single episode  
13 and impulse control disorder. (Tr. 231.) Mr. Anderson diagnosed dysthymic disorder, impulse  
14 control disorder, alcohol dependence in full remission, and borderline personality disorder by  
15 history. (Tr. 356.) In disability cases, the opinion of an acceptable medical source is given more  
16 weight than that of an “other source.” 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d  
17 967, 970-71 (9<sup>th</sup> Cir. 1996). “Other sources” include nurse practitioners, physicians’ assistants,  
18 therapists, teachers, social workers, spouses and other non-medical sources. 20 C.F.R. §§  
19 404.1513(d), 416.913(d). An “other source” opinion may not establish a medically determinable  
20 impairment. *See* S.S.R. 06-3p; 20 C.F.R. §§ 404.1513(d), 416.913(d). The opinions of Mr. Moen  
21 and Mr. Anderson, both social workers, may not establish a medically determinable impairment  
22 and are thus not particularly relevant at the earliest stage of the sequential evaluation. Other

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23 <sup>5</sup> Defendant argues the evidence does not support the durational requirement for a severe  
24 impairment. However, the ALJ did not discuss duration or identify duration as a reason  
25 supporting the decision. (ECF No. 18 at 10.) Defendant also notes Dr. Sabry’s records indicate  
26 plaintiff’s symptoms were aggravated by stress at home or in the context of a death of a friend or  
27 loved one. The context of plaintiff’s symptoms is not relevant in establishing a medically  
determinable impairment since plaintiff’s subjective symptoms are not at issue at this phase of  
the analysis.

1 source opinions may, however, be evidence as “observations by non-medical sources as to how  
2 an impairment affects a claimant’s ability to work” at later stages of the sequential process. *See*  
3 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9<sup>th</sup> Cir. 1987)

4 Plaintiff argues the forms completed by Mr. Moen and Mr. Anderson are actually the  
5 opinions of an acceptable medical source, Dr. Rodenberger, who signed both forms in the box  
6 marked “Releasing Authority Signature.” (ECF No. 15 at 12-15, ECF No. 20 at 7-8, Tr. 234,  
7 359.) Plaintiff therefore argues the opinions should have been considered by the ALJ in  
8 determining whether plaintiff established a medically determinable impairment. There is no  
9 evidence Dr. Rodenberger adopted the opinions or otherwise reviewed and agreed to them.

10 Notwithstanding, the reasons cited by the ALJ for rejecting the opinions are not legally  
11 sufficient. An ALJ is obligated to give reasons germane to “other source” evidence before  
12 discounting it. *Dodrill v. Shalala*, 12 F.3d 915 (9<sup>th</sup> Cir. 1993). The ALJ rejected the findings of  
13 Mr. Moen and Mr. Anderson first because “there is no evidence of treatment accompanying  
14 these assessments.” (Tr. 20.) This is contrary to the direction to ALJ’s to consider observations  
15 by non-medical sources as to how an impairment affects a claimant’s ability to work, *see* 20  
16 C.F.R. § 404.1513(e)(2), and renders meaningless the instruction to consider the opinions of  
17 examining providers. *See Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v.*  
18 *Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). This is not a valid reason for rejecting the DSHS  
19 opinions.

20 The ALJ’s second reason for rejecting the DSHS form opinions is that “claimant  
21 confirmed that he was engaged in significant substance abuse at the time.” (Tr. 20.) A November  
22 2010 note indicates plaintiff drank in September 2010 and was referred for assessment with a  
23 high probability of having a substance dependence disorder, but he completed treatment and was  
24 noted to be in sustained remission by the time of Mr. Anderson’s assessment. (Tr. 355-59.) Thus,  
25 the ALJ’s statement is not accurate and not supported by substantial evidence. Furthermore,  
26 discussion by the ALJ of the effect of substance use on the limitations assessed is premature.  
27 Pursuant to *Bustamante v. Massanari*, consideration of the effects of substance abuse should  
occur only after a finding of disability without considering the impact of any substance abuse.  
262 F.3d 949, 954 (9<sup>th</sup> Cir. 2001) As a result, the ALJ’s reasons for rejecting the opinions are  
inadequate, even if the opinions are weighed as “other source” opinions.





